DATE: July 7, 1995
CASE NUMBERS 95-STA-14
95-STA-15

In the Matter of:

ASSISTANT SECRETARY OF LABOR
FOR OCCUPATIONAL SAFETY & HEALTH,
Prosecuting Party,

GUY V. MULANAX,
Complainant,

and

DANIEL ANDERSEN,
Complainant,

vs.

RED LABEL EXPRESS,
Respondent.

Appearances:

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For the Prosecuting Party

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For the Respondent

Before: Paul A. Mapes
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under Section 405 of the Surface Transportation Assistance Act, 49 U.S.C. §31105 (hereinafter referred to as "the Act" or "the STAA").[1] The Complainants, Guy

[1] The STAA was enacted for the purpose of promoting safety on the nation's highways. Among other things, it prohibits trucking companies from discharging or otherwise discriminating against

V. Mulanax (hereinafter "Mulanax") and Daniel W. Andersen (hereinafter "Andersen"), both allege that they were fired from their jobs at Red Label Express (hereinafter "Red Label") on September 9, 1994, in retaliation for activities that are within the scope of the Act's protection. Their cases were consolidated for hearing with the consent of all parties, and a formal hearing was held in Spokane, Washington, on March 13-14, 1995. At the hearing, testimony was received from 10 witnesses and the following exhibits were admitted into evidence: Prosecuting Party's Exhibits (PX) 1-5 and 7-10; Respondent's Exhibits (RX) 8, 10-12, 24, 31-33, 39 and 42. The Prosecuting Party and the Respondent have both agreed that the proceedings in this case should not be considered terminated for the purposes of complying with the 30-day decisional deadline until the final post-hearing reply brief is filed.[2] Tr. at 596.

BACKGROUND

Complainant Andersen was born on December 11, 1971, and has an eleventh grade education. Tr. at 127, RX 24. Complainant Mulanax was born on March 12, 1974, and has completed one semester of community college. Tr. at 177, 234. The Complainants both live in Priest River, Idaho, and are longtime friends. Tr. at 27, 287.

Respondent Red Label is a family-owned, interstate motor carrier which was founded by its president, John Walker, in 1980. Tr. at 511. Red Label employs 51 drivers and has 48 trucks. Tr. at 511. During all times relevant to the violations alleged herein, John Walker's son, Jimmy Walker, was the Operations Manager for Red Label, John Walker's daughter, Debbie Walker Salisbury, was Red Label's bookkeeper, and John Walker's son-in-law, Ron Salisbury, was a mechanic, "truck boss," and backup driver. Tr. at 84, 401, 419, 519. Until September 8, 1994, Red Label also employed a close friend of the Complainants, Shane Steele, as a data entry clerk and part-time dispatcher. Tr. at 287-88, 298, 340.

A. Summary of Evidence Concerning Andersen

Complainant Andersen began working as a driver for Red Label during the last part of June or the first part of July, 1994, at a salary of $1,000 per month. Tr. at 27-28. Andersen's job as a driver involved delivering freight along a 70-mile route from Post Falls to Mullen, Idaho. Tr. at 28-29. For the majority of the

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employees who have engaged in certain safety-related activities. Regulations implementing Section 405 of the STAA are set forth at 29 C.F.R. §1978.

[2] The final reply brief was received in the San Francisco office of the Office of Administrative Law Judges on June 22, 1995.

time that he worked at Red Label, Andersen drove Red Label's Truck Number 84 (hereinafter "Truck 84"). Tr. at 29.

Shortly after beginning his employment at Red Label, Andersen began making numerous internal reports, both written and verbal, regarding mechanical problems with Truck 84. The written reports, which were contained in daily truck inspection forms, pertained to alleged problems with the truck's horn, brakes, headlights, outside marker lights, interior dome light, fuel gauge, exhaust system, tires, and cargo box.[3] Tr. at 32-44, 137, 165, RX 33. The oral reports, which were less frequent, were generally made to Ron Salisbury or John Walker, but were also addressed to other Red Label employees. Tr. at 44, 53-54, 308-09, 430-31, 515.

Sometime in July of 1994, Andersen was driving Red Label Truck Number 21 when he noticed that one of the inside dual tires was flat. Tr. at 44. While Andersen waited for the tire to be changed at Les Schwab's, a local tire dealer, he casually began examining the truck and noticed that the mountings for the truck's rear leaf springs were defective. Tr. at 44-45. Andersen pointed this out to the mechanic fixing the tire, and, according to Andersen, the mechanic called John Walker to inform him that he wanted the truck towed off the lot because of its dangerous condition.[4] Tr. at 47-49. A short while later, Andersen

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[3] According to Andersen, many of these defects were never fixed, or were fixed only after a lengthy period of time. For example, Andersen testified, during the entire time that he drove Truck 84, neither its interior dome light nor exterior marker lights were in working order. Tr. at 32, 36-37, 42-43.

[4] During the hearing the Respondent objected to the admission of this statement as well as to the admission of various other similar statements by mechanics and police officers on the grounds that such out-of-court assertions concerning the mechanical condition of Red Label trucks are hearsay. Under decisions and regulations promulgated by the Secretary of Labor, out-of-court statements are generally not admissible in proceedings under the STAA to prove the truth of the matters asserted in such statements unless the statements fall within one or more of the specific exceptions set forth at 29 C.F.R. §18.803-804. See Hadley v. Southeast Coop. Service Co., 86-STA-24 (June 28, 1991); 29 C.F.R. §1978.106; 29 C.F.R. §18.101. Although these exceptions are more extensive than the various exceptions to the hearsay rule set forth in the Federal Rules of Evidence and common law evidence treatises, they are not so extensive that they would ordinarily permit out-of-court statements of mechanics or police officers to be admitted for the purpose of proving that a particular vehicle was unsafe to operate. Hence, such statements cannot be regarded as probative evidence concerning the mechanical condition of the various trucks driven by the Complainants. However, it is also important to

testified, he also called Walker and told him that he did not want to drive the truck because he did not feel that it was safe. Nonetheless, according to Andersen, Walker told him to drive carefully but finish his deliveries. Tr. at 49-50. When Andersen finished the route, he returned to Red Label and complained to John Walker about the condition of the truck. Although Andersen concedes that he was upset and raised his voice, he asserts that he did not yell, scream or curse during the conversation. Tr. at 51.

On another occasion in July, Andersen testified, he was driving Truck 84 on his usual route when his eyes started burning because of exhaust leaking into the cab.[5] Tr. at 54. He therefore stopped at a gas station, called the State Police, and asked that an officer pull him over to check the leak. Tr. at 54. According to Andersen, he was subsequently pulled over by the State Police and given a warning ticket for various alleged mechanical defects, including an alleged exhaust leak. Tr. at 55-57. In addition, Andersen testified, the ticket also directed that the truck be placed out of service until it was inspected. Tr. at 59. Andersen testified that he gave the ticket to Ron Salisbury when he returned to the Red Label terminal that afternoon.[6] Tr. at 59. According to Andersen, shortly after he returned from lunch later that same day, he saw that Truck 84 had been loaded for its afternoon run. Tr. at 61. Andersen testified that he then went back into the Red Label office and asked John Walker why Truck 84 was going out again when the ticket he just received stated that it should be out of service until inspected.[7] Tr. at 64. Andersen further testified that although he raised his voice during the conversation, he did not yell, scream, or curse. Tr. at 64. According to John Walker,

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recognize that such statements can be admitted into evidence for other purposes, such as showing that a Complainant engaged in a protected activity or that a Complainant had a reasonable and good faith basis for a particular action. Thus, to the extent that such hearsay statements have been admitted into evidence in this proceeding, they have been admitted solely for such purposes and have not been treated as probative in any other respect. Any evidentiary ruling to the contrary during the hearing is hereby withdrawn.

[5] John Walker testified that he believes that the exhaust leak was on Truck Number 21, not Truck 84. Tr at 516.

[6] Ron Salisbury testified that he does not remember seeing the ticket itself, but does recall Andersen telling him that he had received either a ticket or a warning concerning an exhaust leak. Tr. at 414-15.

[7] According to John Walker, Andersen also stated that he had asked the highway patrol to pull him over because of the exhaust leak. Tr. at 515-17.

however, Andersen came into his office "hollering," even though Walker was already involved in a meeting with two outside consultants.[8] Tr. at 517.

According to Andersen, on September 7, 1994, he noticed that the drag link on Truck 84 was so worn that the truck would wander from side to side as it moved down the road. Tr. at 66-67. Andersen made a written notation of the problem on a vehicle inspection report and also told John Walker about the situation over the truck's radio. According to Andersen, Walker told him that there was nothing wrong with the steering. Tr. at 68. Later that day, Andersen testified, he spoke to Ron Salisbury about the steering problem and was told that a new part for the steering had already been ordered. Tr. at 69. According to Andersen, he then told Salisbury that he did not want to drive Truck 84 until the steering was fixed. Tr. at 69. As well, Andersen wrote a note stating that if he was told to drive Truck 84 before it was fixed, he would take it to the scales at the Washington State port of entry and have it inspected. Tr. at 70. Andersen addressed the note to John or Jimmy Walker and placed it in the middle of John Walker's desk.[9] Tr. at 70.

When Andersen arrived to work on the morning of September 8, 1994, the freight that he was to deliver that day was loaded in Truck 84. Tr. at 71. While Andersen was at the office picking up his paperwork, he testified, he asked Ron Salisbury and Jimmy Walker what would happen if the drag link fell apart and caused an injury. According to Andersen, Salisbury and Walker informed him that there was absolutely no way that the drag link would fall apart. Tr. at 72. While on his route, Andersen stopped at three different auto repair shops and had mechanics write up "estimates" concerning the drag link.[10] Tr. at 73, PX 1-3. When Andersen

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[8] There were apparently at least two other witnesses to the conversation, Cheryl Eby, a dispatcher at Red Label, and Shane Steele. According to Eby, Andersen was very loud and angry. Tr. at 481-82. In contrast, Shane Steele testified that although Andersen was upset and raised his voice, he did not yell, curse, or in any other way act disrespectfully toward Walker. Tr. at 312, 326.

[9] Shane Steele testified that he observed Andersen writing this note and saw him place it in the center of John Walker's desk. Tr. at 315-17. As well, both Debbie Salisbury and John Walker acknowledged reading the note. Tr. at 501, 546-47.

[10] These "estimates" are not in fact actual estimates of repair costs but merely statements asserting that the steering mechanism in Truck 84 needed repairs. Since these statements constitute hearsay, they have not been considered for purposes of proving the

returned to the Red Label terminal after completing his route, he wrote another note to John and Jimmy Walker. This note stated: "I will not drive 84 again untill [sic] it is fixed. I have statements attached which show it is not safe to drive." Tr. at 80, 82, PX 4. Andersen placed this note, along with the three "estimates," on top of the note that he had placed on John Walker's desk the day before. Tr. at 83. John Walker has acknowledged seeing both this second note and its attachments.[11] Tr. at 557.

Sometime after Andersen left the note on John Walker's desk, Tom Jones, another Red Label driver, took Truck 84 to the scales and had it inspected. Tr. at 149. At the scales the Washington Department of Transportation issued Jones a ticket because the truck had excessive play in its drag link.[12] Tr. at 88, PX 5. Although Andersen denied telling Jones to have Truck 84 inspected, he testified that he may have suggested to Jones that such an inspection would be a good idea. Tr. at 149-150.

When Andersen reported for work on the morning of September 9, 1994, the freight that he was to deliver was again loaded in Truck 84. Tr. at 84. Andersen drove the truck to the Red Label office and asked Debbie Salisbury what would happen if the truck crashed and injured someone. Tr. at 84. Andersen testified that Salisbury would not answer his question, but told him that the truck had to go out that day because there was no other truck to replace it. Tr. at 84. Salisbury testified that when Andersen told her that the truck was still having a problem, she told him that a part was on order. Tr. at 498. In addition, she testified, she told Andersen that she had "no idea" what to do about any mechanical problem and that all she knew was that "he had to deliver his freight." Id.

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truth of the matter asserted therein, i.e., that repairs were actually needed. These statements, however, do corroborate Andersen's assertion that he made complaints about safety problems with Truck 84 and have therefore been admitted into evidence for that purpose.

[11] John Walker has also acknowledged that he probably wrote the notation on the bottom of the note which states, in a different handwriting: "9/6 -- parts ordered, out of service." PX 4, Tr. at 557-58. Walker contends, however, that this statement does not mean that Truck 84 had been taken out of service on September 6, but only that the part was ordered on the sixth and that the truck was scheduled to be out of service on September 10, at which time he was going to replace the drag link himself. Tr. at 557-58, 521.

[12] The ticket states, in relevant part: "CORRECT VIOLATION(S) IMMEDIATELY. Return this signed card for proof of compliance within 15 days." PX 5.

Thereafter, Andersen went to John Walker's office and looked on his desk to see if the note and attached estimates were still there. On top of his note, Andersen saw the ticket that Tom Jones had received the day before. Tr. at 88. Andersen made a copy of the ticket and drove Truck 84 along his usual route to the scales. Tr. at 90. Andersen testified that when he arrived at the scales, he gave the ticket and the three "estimates" to an individual working there. Tr. at 91. Thereafter, according to Andersen, the individual inspected the truck and told him that the truck was not safe to drive.[13] Tr. at 91. Andersen then called the Red Label office, spoke to Debbie Salisbury, and told her the situation. According to Andersen, she told him "you did exactly what you said you were going to do, didn't you?"[14] Tr. at 92. On the directive of Salisbury, Andersen then walked back to the terminal, picked up another truck, and drove it back out to the scales. Tr. at 96. Shortly after Andersen returned to the scales an officer from the Idaho State Patrol arrived, inspected Truck 84, wrote out a ticket, and placed the truck out of service. Tr. at 97, RX 38. Andersen then finished loading the replacement truck and completed his route. Tr. at 102.

When Andersen returned to the Red Label terminal at approximately 3:00 to 3:30 p.m., he gave Ron Salisbury a copy of the ticket from the Idaho State Patrol and asked Jimmy Walker if he still had a job. Tr. at 100, 103. According to Andersen, Walker told him that he did not know and that he would have to talk to John Walker. Tr. at 103. Andersen subsequently saw John Walker at the terminal giving a drag link part to a mechanic, but did not attempt to speak to him at that time because he wanted to talk to him at the office. Tr. at 103, 555-56. Ultimately, however, Andersen left for home without speaking to John Walker. Id.

Since Andersen was scheduled to drive early the following morning, he called Red Label's office sometime between 8:00 and 10:00 p.m. on the evening of September 9 to ask if he was still employed. Tr. at 104, 455. The call was answered by Seana Peterson, Red Label's Accounts Receivable Manager, who then called Ron Salisbury for advice. According to Andersen, Peterson told him that Salisbury had said that he "didn't need to bother coming back." Tr. at 104, 454. Andersen testified that he believed that Salisbury had the power to hire and fire and that he had therefore

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[13] Since the individual who made this statement did not testify at the hearing, the statement has not been considered for purposes of proving that the truck was unsafe. However, it has been considered as circumstantial evidence that Complainant Andersen reported alleged safety problems with Truck 84.

[14] Salisbury, however, testified that she does not remember saying these words to Andersen. Tr. at 501.

concluded that Salisbury's response meant that his employment with Red Label was terminated as of September 9, 1994. Tr. at 154-545. Peterson, however, testified that Salisbury only told her to tell Andersen "not to worry about it, that [his] route was covered in the morning," and that Salisbury said nothing about the job issue. Tr. at 456-57. Peterson also testified that she told Andersen that if he "had a problem," he would have to speak to John Walker. Id. According to Ron Salisbury, he instructed Peterson to tell Andersen that he would have to ask John Walker if he had been fired, but that he did not need to bother showing up to work the next morning. Tr. at 444, 447. Salisbury testified that he made this statement because he felt, based on the time of the call and the distance that Andersen lived from the terminal, that Andersen would have received only two hours of sleep before beginning his eight hour shift. Tr. at 447.

According to John Walker, Andersen called him on Monday, September 12, to ask if he still had a job. Tr. at 538-40. In response, Walker testified, he told Andersen that he was fired and that he would mail him a copy of a "Daily Incident Log," which would set forth the reasons for his termination. Id. The Daily Incident Log that Walker later sent to Andersen (RX 31) is a single sheet of paper which states as follows:

> 7/21 Insubordination -- Disrespect.
> Witnessed by 2 George S. May Rep.
>
> 9/9/94 Continued Personality Conflicts
> Fired because of Attitude
> and disrespect for Co. --
>
> Payroll advances Given and deducted --
>
> Wrote up and Signed
> John Walker

On November 15, 1994, John Walker was interviewed concerning Andersen's termination by Russell C. Hart, an investigator employed by the Occupational Safety and Health Administration ("OSHA"). Tr. at 345. According to Hart, Walker asserted that he could not remember why he discharged Andersen, and then indicated to Hart that the interview was over.[15] Tr. at 362-63.

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[15] Hart testified that prior to interviewing John Walker, he had interviewed his son, Jimmy Walker. According to Hart, Jimmy Walker told him that on July 21, 1994, Andersen "blew up" at John Walker while there were members of a consulting firm in Walker's office, and that the consultants remarked that they would have discharged Andersen for his actions. Tr at 353. Hart further testified that Jimmy Walker had also stated that he did not know anything about the Daily Incident Log entry dated September 9 and

During the hearing, John Walker testified that he made the decision to terminate Andersen after a meeting at his home on September 10 where he, his son Jimmy, and some other Red Label drivers discussed problems they were having with Andersen, including Andersen's alleged attempts to persuade the other drivers to walk off the job and Andersen's efforts to persuade Tom Jones to take Truck 84 to the scales to have it inspected.[16] Tr. at 534-36, 558. John Walker acknowledged that during this meeting he learned for the first time that Andersen had carried out his threat to have Truck 84 inspected. Walker testified that when he decided to fire Andersen, he considered the conflict that Andersen was creating at Red Label and the disrespect that Andersen had previously shown to him.[17] Tr. at 519, 541. However, he testified, the main reason for firing Andersen was to prevent his son, Jimmy, from beating "the crap" out of Andersen. Id., Tr. at 541, 558-59. In this regard, Walker asserted that such an altercation appeared likely because there was a "personality conflict" between his son and Andersen. Tr. at 558-59. Walker initially testified that he did not have a

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that Hart would have to ask his father about it. Id.

[16] According to Walker, the final entry on the Daily Incident Log concerning Andersen was actually written on September 10, 1994, but dated September 9, 1994, because that was the last day that Andersen was to be paid. Tr. at 560.

[17] John Walker's assertions about Andersen's alleged attitude problems were supported by various other Red Label employees. For example, Ron Salisbury testified that he had problems getting along with Andersen and that he was afraid of Andersen because of his "attitude and moodiness." Tr. at 415. Likewise, Cheryl Eby testified that every time she saw Andersen in the office he was so "volatile" and "highly excited" that she did not like being in the same room with him. Tr. at 481. Similarly, Debbie Salisbury testified that Andersen was "obnoxious" and had a "terrible temper." Tr. at 496. There is, however, other evidence which conflicts with this testimony. For example, on cross examination Ron Salisbury admitted that Andersen had never said anything threatening to him, that he never heard Andersen raise his voice, and that he only spoke with Andersen on a few occasions. Tr. at 416, 434. Similarly, Eby admitted that she never complained about Andersen and that he never did anything to her personally. Tr. at 481. Moreover, there is no evidence that Andersen was ever reprimanded for insubordination, disrespect, personality conflicts, or attitude. Tr. at 108-09. In addition, Shane Steele testified that the only time he ever heard Andersen raise his voice at Red Label was on July 21, 1994. Steele also asserted that he never saw Andersen act disrespectfully toward any Red Label employees and was unaware of any problems between Andersen and the other office workers. Tr. at 308, 313.

problem with Andersen taking Truck 84 to be inspected,[18] but later acknowledged that it did have at least some bearing on his decision to fire Andersen.[19] Tr. at 538, 542, 558. As well, Walker acknowledged that Andersen's actions on the morning of September 9 created a shortage of one truck, caused deliveries to be late, and cost Red Label $50 for towing. Tr. at 538, 540.

After Andersen was terminated by Red Label, he began working 30 to 40 hours a week as a self-employed logger. Tr. at 114-15. Andersen's gross earnings from this employment were $2,800.00. However, according to Andersen, after expenses, including the cost of parts, repairs, gas, and oil for his chain saw, maintenance for his trailer, and amounts paid to have a trucker tow the logs, he netted only $1,800.00. Tr. at 114-15, 132, 134, 167. After his opportunities for this type of work ended in early January of 1995, Andersen applied for work at several temporary services that specialize in industrial employment, followed up a lead on a trucking job, and reviewed the classified ads in local papers on a weekly basis. Tr. at 115-16, 578. As a result of these efforts, on January 30, 1995, he was able to obtain a temporary job at Sunshine Minting in Hayden Lake, Idaho.[20] Tr. at 116, 130, 579. At the time of the hearing, Andersen was working an average of 50 hours per week at that job and earning an average gross weekly income of $230.00. Tr. at 27, 118, 130. As well, Andersen expected that on March 20, 1995, he would start a full time job at Sunshine Minting that would pay $7.00 per hour. Tr. at 131. In order to appear at the hearing, Andersen missed two days of work and, as a result, lost an estimated $140 in wages. Tr. at 117-18.

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[18] In support of this assertion, John Walker also testified that other drivers have intentionally taken trucks to be inspected without being fired. Tr. at 542. For example, he testified, drivers Dave Stoddard and Tom Jones had taken trucks to be inspected two or three times without losing their jobs. Tr. at 153, 520, 542.

[19] In particular, Walker testified that Andersen's decision to take Truck 84 to the scales "was just another, show you that I can do this or whatever," and "a culmination of I'm better than thou" behavior, but that "[i]t really wasn't that much to figure into [the termination]." Tr. at 542.

[20] It is noted that Andersen testified that as of March 13, 1995, he had worked at Sunshine Minting for exactly six full weeks, and therefore concluded that he had begun working at that job on January 23, 1995. Tr. at 130. Reference to the calendar, however, indicates that if in fact Mr. Andersen had been working for exactly six full weeks on March 13, he must have begun his employment with Sunshine Mining on January 30, not January 23.

The evidence also shows that on February 16, 1995, Red Label sent the Solicitor a written offer to reinstate Andersen pending a final decision in this case.[21] Tr. 172-73. During the hearing, however, Andersen declined any offer of reinstatement on the grounds that his present employment is more lucrative. Tr. at 173.

B. Summary of Evidence Concerning Mulanax

Complainant Mulanax began working for Red Label on July 14, 1994, as a terminal worker earning $4.60 per hour. Tr. at 176-77. In the middle of August, 1994, he was transferred to a driving job and his wages increased to $5.00 per hour. Id. Once he began working as a driver, Mulanax drove a small blue van in the mornings and a larger vehicle known as a Truck Number 80 (hereinafter "Truck 80") in the afternoons. Tr. at 178-79. According to Mulanax, during the time that he was a driver for Red Label, he made written reports concerning a variety of problems with Truck 80, including a minor exhaust leak, a missing carrier arm nut, a defect in a door, a cracked windshield, and a missing fire extinguisher.[22] Tr. at 188-89. In addition, Mulanax testified, on at least two occasions, he made verbal reports to Ron Salisbury and others about a problem with the truck's carrier arm.[23] Tr. at 189-92. This testimony was partially corroborated by Ron Salisbury and Shane Steele. Tr. at 406, 443 (testimony of Ron Salisbury), Tr. at 303 (testimony of Shane Steele).

According to Mulanax, on the morning of September 9, 1994, Debbie Salisbury told him that two people had quit and that he would have to drive the south Coeur d'Alene route as well as his

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[21] This offer is contained in Respondent's Exhibit 40, which was marked at the time of the hearing, but not offered into evidence by any party. As made clear in that letter, the offer was made only because Andersen's reinstatement pendente lite had been ordered by the Regional Administrator of OSHA on December 14, 1994, pursuant to the provisions of 49 U.S.C. §31105(b)(2)(A).

[22] According to Mulanax, none of these conditions was repaired during the period when he drove Truck 80, even though he filled out inspection reports an average of three or four times a week. Tr. at 182, 189.

[23] According to Mulanax, the carrier arm problem would cause the truck to shimmy and shake, and he would have to come to a complete stop in order to stop the shaking. Tr. at 188. Mulanax testified that Ron Salisbury and James Walker responded to his initial reports of the problem by chuckling and saying "its getting worse, huh." Tr. at 189-90.

usual route.[24] Tr. at 196. Mulanax testified that he then decided to drive Truck 80 because the amount of cargo he would be carrying would be too great for the blue van that he usually drove in the mornings. Tr. at 196. However, he asserted, when he went to Truck 80 the keys were not in the ignition. As a result, he explained, he went to Cheryl Eby, the morning dispatcher, and was told to look for the keys around the office.[25] Tr. at 197-198. Eventually, Mulanax testified, he found the keys on a table in a small room at the end of the Red Label terminal. Tr. 198-99. According to Mulanax, there was nothing in Truck 80 or attached to the keys which indicated that Truck 80 had been taken out of service. Tr. at 200. As well, he testified, no one at Red Label told him that he should not take Truck 80 or that the absence of keys from a truck meant that it was out of service.[26] Tr. at 199-203, 430.

According to Ron Salisbury, however, Truck 80 had in fact been taken out of service by the time that Mulanax arrived at work on September 9. In particular, Salisbury testified that on the evening of September 8 he had discovered a problem with the truck's ball joints and had therefore taken the truck out of service by removing the keys from the ignition and attaching them to a paper which indicated that the truck was not to be driven.[27] Tr. at 406, 424, 443. Salisbury further testified that, according to Red Label

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[24] Debbie Salisbury testified that she does not remember telling Mulanax that he had to drive two routes on September 9, 1994, but acknowledged that she could have made such a statement. Tr at 507. Cheryl Eby, however, testified that Mulanax was not asked to drive more than one route on the morning of September 9, 1994. Tr at 486.

[25] Cheryl Eby, however, denies any recollection of Mulanax asking about the keys for Truck 80 on the morning of September 9. Tr. at 480, 486.

[26] Both Andersen and Steele also testified that they were unaware that the absence of keys from a truck was supposed to mean that the truck was out of service. Tr. at 109-13 (testimony of Andersen), Tr. at 300-01, 335 (testimony of Steele). Steele also testified that he was dispatching on September 6, 7, and 8 and that he was not told on any of those days that Truck 80 was out of service. Tr. at 304.

[27] However, it is noted that in answers to interrogatories, Red Label stated that Truck 80 was taken out of service on or around September 5, 1994, but, in any event, before September 9, 1994, and that the only measure taken to withdraw the truck from service was the removal of the keys from the vehicle. Tr at 425, 568. It is also noted that Mulanax testified that he drove Truck 80 on September 6, 7 and 8 and that the keys were in the ignition on each of these days. Tr. at 227.

policy, if a key is not in a vehicle's ignition or on the visor above the driver's seat, the vehicle is out of service. Tr. at 408. Ron Salisbury's assertion that Truck 80 was out of service on September 9 is supported by the testimony of Cheryl Eby, Debbie Salisbury, and John Walker. Tr. at 477 (testimony of Cheryl Eby), Tr. at 493-94 (testimony of Debbie Salisbury), Tr. at 512 (testimony of John Walker). As well, the testimony of Cheryl Eby (Tr. at 477-79), Debbie Salisbury (Tr. at 494-95), and John Walker (Tr. at 514) is generally consistent with Ron Salisbury's testimony regarding Red Label's policy on out-of-service vehicles. However, John Walker did testify that although Ron Salisbury started a practice of labelling the keys of trucks that are out of service, that policy was not in force in September of 1994. Tr. at 514. Walker further testified that Salisbury started this practice because he found that "there was such a problem with guys grabbing the keys." Id.

According to Mulanax, after leaving Red Label's terminal in Truck 80 he noticed that the truck was shimmying and therefore stopped at a nearby truck stop to have the truck inspected. Tr. at 203-04. At the truck stop, Mulanax testified, a mechanic told him that the vehicle was "in critical shape" and that he could lose control of it at any time. Tr. at 203-04. Mulanax then drove to the scales where Andersen was having his truck inspected. According to Mulanax, he had two reasons for going to the scales: (1) to help Andersen reload his cargo, and (2) to request an inspection. Tr. at 204-05.

When Mulanax arrived at the scales, he helped Andersen move a few shipments from Truck 84 into the new truck, but shortly thereafter asked an officer to inspect his truck. Tr. at 100, 205. The officer inspected the truck and, according to Mulanax, found that the carrier arm was missing a bolt, that there was excessive play in the steering wheel, and that there was no fire extinguisher or warning setups. Tr. at 208. As a consequence of these alleged violations, the officer issued a citation and "red tagged" the truck.[28] Tr. at 206.

After the officer "red tagged" Truck 80, Mulanax called Cheryl Eby on the radio inside the truck, explained the situation to her, and told her that Truck 80 needed to be towed. Tr. at 209. Mulanax testified that Eby was upset and that she told him to walk down to the terminal and pick up another truck so that he could finish his route. Tr. at 209-10. Mulanax testified that he told Eby that he was not going to walk to the terminal because it was raining and because it was illegal to walk on an interstate highway. Tr. at 211. According to Mulanax, this exchange was repeated a couple of times before he finally said that he "wasn't

[28] When a truck is "red-tagged," it can no longer be driven and must be either towed away or fixed. Tr at 209.

going to walk down in the goddamn rain." Tr. at 211. However, according to Eby, Mulanax told her "I ain't walking in this fucking rain" and "If you want this fucking freight delivered, somebody's going to come get me."[29] Tr. at 476. Eby's account of this conversation is corroborated by Ron Salisbury, Debbie Salisbury, and John Walker, all of whom testified that they overheard Mulanax say either "fuck" or "fucking" on the radio. Tr. at 402 (testimony of Ron Salisbury), Tr. at 493 (testimony of Debbie Salisbury), and Tr. at 522 (testimony of John Walker).

Eventually, Mulanax got a ride in the tow truck that hauled Truck 80 to a local garage. Tr. at 212. Ron Salisbury met Mulanax at the garage, helped him transfer the freight from Truck 80 into the blue van, and drove him back to Red Label. Tr. 213, 441. According to Mulanax, he then continued his route in the blue van until he encountered a problem with the van's brakes. Tr. at 215. As a result, he testified, he called Jimmy Walker on the radio and told him that because of this problem, he did not want to continue driving the van.[30] Tr. at 214-15. According to Mulanax, Walker then told him to get back to the office. Tr at 216. As soon as he returned, Mulanax testified, he was told by Jimmy Walker to go immediately to John Walker's office. Tr. at 216. Once there, according to Mulanax, John Walker told him that the Federal Communications Commission ("FCC") had called and told him that Red Label was going to be fined for what Mulanax had said over the radio, but that if Red Label fired him, the fine would be smaller. Tr. at 217. Thereupon, Mulanax testified, John Walker immediately discharged him. Id.

According to Mulanax, on the following Monday (September 12) he returned to Red Label with a note for John Walker which requested that he be given his final paycheck within 48 hours. Tr. at 219. In response, Mulanax testified, Walker told him that he would give him his paycheck by 4:00 p.m. that afternoon, but that he would first have to sign a "Daily Incident Log" which set forth the reasons for his termination. Tr. at 219. Mulanax further testified that when he returned later to pick up his check, he was

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[29] However, on cross examination Eby admitted telling OSHA investigator Russell Hart in November of 1994 that Mulanax had told her that he wasn't going to walk in the "damn rain." Tr. at 489-90. When Hart was called as a rebuttal witness, he verified that Eby had in fact said that Mulanax had referred to the "damn rain," but further testified that the during the same interview Eby also said that Mulanax had "used the F word." Tr. at 591.

[30] According to Mulanax, both Jimmy Walker and Ron Salisbury told him about the problem with the brakes before he left with the van. Tr. at 213-14. Salisbury, however, testified that there were no problems with the van's brakes until Mulanax returned from his route. Tr at 442.

shown the Daily Incident Log but refused to sign it. Id., Tr. at 219-20, 526, 528-29, RX 12. The Daily Incident Log (RX 12) states as follows:

> payroll advance
> not showing up to ride with
> Owner to learn Route.
> Late on Sat. had to call in
> Owner --
>
> 9/9 driving trk that was out of
> service -- key put in room with
> no light -- parts had been on
> order for 2 days -- came in that day.
>
> 9/9/94 Fired because of complaint
> from F.C.C. monitor from Spo
> on profanity over a B.C. Freq.
>
> Wrote up by John Walker
>
> chance read this report 9/12/94 16:30
> and refused to sign it!

The date on the top of the Daily Incident Log is "9-12-94" but it appears that the "1" in the "12" was originally a "9." RX 12.

John Walker's version of Mulanax's termination differs in two important respects from Mulanax's account. First, Walker contends that he did not speak to Mulanax at all about his termination until September 12 and claims that he was not even at Red Label's office at the time of day on September 9 when Mulanax alleges he was fired. Tr. at 525-26, 533-34. Second, Walker contends that, contrary to Mulanax's assertions, he did not receive the alleged phone call from the FCC until sometime during the evening of September 9, when someone he believed to be an FCC agent called him at home. Tr. at 529. According to Walker, during the call an unidentified person asked him if he had heard what was said on the radio that day and told him that "we cannot have that kind of language over the radio." Tr. at 531. Walker testified that although the caller did not identify himself, he assumed that the caller was with the FCC. Tr. at 531, 571-72. Walker also testified that although two of the entries on the Daily Incident Log documenting Mulanax's termination were dated September 9, all of the entries on that document were in fact written on the morning of September 12. Tr. at 529, 570-71.

During his testimony John Walker gave two reasons for his decision to terminate Mulanax. First, he testified, Mulanax was discharged because of the language that he allegedly used over the radio. Tr. at 529, 532. Indeed, Walker asserted, he decided to fire Mulanax as soon as he overheard Mulanax's conversation with

Eby on the morning of September 9, and would have fired him even if he had not received the alleged call from the FCC.[31] Tr. at 523, 529, 532. In this regard, Walker also noted that he had even fired Ron Salisbury during the last week of October of 1994 for using the same type of profanity on the radio.[32] Tr. at 543-44. Second, Walker testified, he believes that Mulanax knew Truck 80 was out of service when he took it on the morning of September 9 and that he therefore, in effect, stole the truck. Tr. at 533. In any event, Walker testified, he was not bothered that Mulanax had taken Truck 80 to be inspected. Tr. at 532-33. In fact, he noted, the truck was scheduled to be in the shop anyway, and it only cost Red Label an additional $35 to pay for the ticket. Id.

John Walker's assertion that he had been called by the FCC was contradicted during the hearing by Jack Bazhaw, Engineer in Charge of the regional FCC office with responsibility for monitoring radio communications in the states of Oregon, Washington, Idaho, and Montana. According to Bazhaw, FCC records show that none of the personnel in his office were in any location on September 9, 1994, where they could have overheard land-mobile radio transmissions in the vicinity of Post Falls, Idaho. Tr. at 389-90. Moreover, he testified, even if these personnel had overheard some profane language, they would have been precluded from taking any action unless they had received a written or oral complaint from a member of the general public. Tr. at 391. Indeed, Bazhaw testified that he seriously doubts whether any action would have been taken by the FCC even if Mulanax had said the worst of what Red Label alleges. Tr. at 393-94. Bazhaw also noted that he could not recall a single time during his 38 years with the FCC when the Commission had taken action against a licensee for the use of profane language over a land-based mobile frequency. Id.

According to Mulanax, after he was terminated from Red Label he searched the classified ads in the Bonner County Daily Bee and submitted employment applications to seven different employers, but was unable to find any work other than a few odd jobs that paid a total of $220. Tr. at 235-41. However, he testified, just before

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[31] Walker also asserted that he had attempted to call Red Label over the radio immediately after hearing Mulanax's comments, but had not been heard because his radio's transmitter was too weak to reach Red Label's dispatcher from his location. Tr. at 524-25. At that time, Walker asserted, he was aware that Mulanax was at the scales but did not suspect that Mulanax might have driven a truck to the scales with the intention of having it inspected. Tr. at 562-63.

[32] Although the testimony of Ron Salisbury corroborates Walker's assertion that he fired Salisbury for using profane language on the radio, the record also shows that Salisbury was subsequently rehired. Tr. at 417, 543-44.

the hearing he had applied for a $6.00 per hour job at a publishing company and indicated that he expected to begin working at that job on March 20, 1995. Tr. at 238. Mulanax admits that while he was unemployed, he failed to read the classified sections of various newspapers that would have had more job listings than the Bonner County Daily Bee and that he did not register with the local unemployment office. Tr. at 235, 253-54, 332. As well, he acknowledged that from the middle of October of 1994 until the end of February of 1995, he attended classes at a local police academy on weekends and two nights a week.[33] Mulanax also acknowledged that he received a written offer of re-employment from Red Label on February 28, or March 1, 1995, but indicated that he does not now wish to return to such employment.[34] Tr. at 242-43, RX 39. He reiterated his determination not to return to Red Label's employment, even after being informed that it would be unlawful for Red Label to harass him or manufacture a bogus reason for again terminating his employment. Tr. at 242-43, RX 39.

ANALYSIS

The parties have stipulated to the existence of the factual prerequisites for jurisdiction under the Act, and it is clear from the evidence that such jurisdiction does exist. Tr. at 22-23. In addition, the parties stipulated that Complainant Andersen earned a salary of $1,000 per month during the time that he worked at Red Label Express and that Complainant Mulanax earned $5.00 per hour while he worked as a driver for Red Label. Id. Hence, the only issues in dispute are the legality of the terminations and, if any violations occurred, the nature of the appropriate remedies. See 49 U.S.C. §31105.

The legal standard for determining if there has been a violation of the STAA is well established. In particular, a complainant must initially present a prima facie case consisting of a showing that he or she engaged in protected conduct, that the employer was aware of that conduct, and that the employer took some

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[33] The classes lasted from 6:00 to 10:00 p.m. on Tuesdays and Thursdays and all day on Saturday and Sunday. Tr. at 245. Mulanax voluntarily withdrew from the academy in February of 1995 after being told that he had been observed drinking alcohol before his twenty-first birthday. Tr. at 235, 244-45, 295.

[34] Like the offer of reinstatement sent to Anderson, Red Label's offer to re-employ Mulanax was made only because the Regional Administrator of OSHA issued an order in December of 1994 requiring that such an offer be made.

adverse action against the complainant.[35] In addition, as part of the prima facie case the complainant must present evidence sufficient to raise the inference that the complainant's protected activity was the likely reason for the adverse action. If the complainant establishes a prima facie case, the employer then has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, non-discriminatory reasons. At this point, however, the employer bears only a burden of producing evidence, and the ultimate burden of persuasion of the existence of intentional discrimination rests with the employee. If a respondent successfully rebuts the employee's prima facie case, the employee still has the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This may be accomplished either directly, by persuading the factfinder that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the employer's proffered explanation is unworthy of credence. In either case, the factfinder may then conclude that the employer's proffered reason is a pretext and rule that the complainant has proved actionable retaliation for the protected activity. Conversely, the trier of fact may conclude that a respondent was not motivated in whole or in part by the employee's protected activity and rule that the employee has failed to establish his or her case by a preponderance of the evidence. Finally, the factfinder may decide that the employer was motivated by both prohibited and legitimate reasons, i.e., that the employer had dual or mixed motives. In such a case, the burden of proof shifts to the respondent to show by a preponderance of the evidence that it would have taken the same action with respect to the complainant, even in the absence of the employee's protected conduct. See Darty v. Zack Company, 80-ERA-2 (April 25, 1983); McGavock v. Elbar, Inc., 86-STA-1 (July 9, 1986); Nix v. Nehi-RC Bottling Co., Inc., 84-STA-1 (July 13, 1984). See also Roadway Express, Inc. v. Brock, 830 F.2d 179 n.6 (11th Cir. 1987).

The provisions of the STAA expressly provide that if a complainant has been terminated from his or her employment in violation of the Act's provisions, the complainant is entitled to reinstatement and compensatory damages, including back pay. 49 U.S.C. §31105(b)(3)(A). Moreover, any uncertainties concerning the

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[35] In this regard, it is noted that an employee's safety complaints fall into the category of protected conduct, even if there is no showing that the complaints were actually meritorious. Yellow Freight System, Inc. v. Martin, 954 F.2d 353, 356-57 (6th Cir. 1992); Allen v. Revco D.D., Inc., 91-STA-9 (Sept. 24, 1991). Moreover, the types of safety complaints protected under the STAA include both internal complaints and complaints to law enforcement agencies. Doyle v. Rich Transport, Inc., 93-STA-17 (April 1, 1994); Davis v. H.R. Hill, Inc., 86-STA-18 (March 18, 1987).

amounts that an employee would have earned but for the illegal conduct should be resolved against the discriminating party. Moravec v. HC & M Transportation, Inc., 90-STA-44 (Jan. 6, 1992). In addition, the Secretary may award pre-judgment interest on awards of back pay and benefits based on the interest rates set forth in 26 U.S.C. §6621. Nidy v. Benton Enterprises, 90-STA-11 (Nov. 19, 1991).

A. Andersen's Termination

As noted above, in order to establish a prima facie case a complainant must establish: (1) that he engaged in protected activity, (2) that the respondent knew of the protected activity, (3) that the respondent took adverse action against him, and (4) that the protected activity was the likely reason for the adverse action. It is clear that Andersen has proven the first three of these elements. He definitely engaged in a long series of protected activities, virtually all of these activities were known to Red Label, and an adverse action was taken against him. Thus, if Andersen has also produced enough evidence to warrant at least an inference that his protected activities were a likely reason for his termination, he will have established a prima facie case. In this regard, review of the record indicates that Andersen has clearly satisfied this requirement. Indeed, the record shows such a close temporal proximity between Anderson's protected activities on September 9 and his termination that there is a very strong reason for concluding that there was a causal relationship between Andersen's termination and his protected activities. See Moravec v. HC & M Transportation, Inc., 90-STA-44 (Jan. 6, 1992).

Since Andersen has established a prima facie case, Red Label has the burden of producing evidence to show that the adverse action against Andersen was in fact motivated by legitimate and lawful considerations. As previously explained, Red Label has attempted to satisfy this burden by presenting the testimony of various witnesses who alleged that Andersen had a "bad attitude" and "personality conflicts" with other employees. Such evidence is sufficient to meet an employer's burden of producing evidence of a lawful motive for its conduct. See St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S.Ct. 2742 (1993); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). Accordingly, it is necessary to weigh all of the relevant evidence in order to determine if Andersen was fired in violation of the STAA.

Review of all of the evidence concerning Andersen's termination by Red Label clearly demonstrates that the termination was the direct result of Andersen's safety complaints and that the alternative reasons that Red Label has given for the termination are nothing but a pretext. Indeed, the alternative justifications offered by John Walker and the other Red Label witnesses are remarkably unpersuasive. Although these witnesses have managed to

come up with a long list of derogatory adjectives to describe Andersen's personality (e.g. "obnoxious," "volatile," "abrasive," and "moody"), they have failed to provide enough specific examples of antisocial conduct by Andersen to give any credibility to such assertions. In fact, the only specific example of such conduct by Andersen is the testimony indicating that Andersen spoke too loudly on July 21, 1994, when complaining to John Walker about Red Label's continued use of a truck that was supposed to have been taken out of service.[36] In view of the fact that Andersen was not even warned about such allegedly insubordinate behavior at the time it occurred, it is hard to believe that it provided an independent basis for Andersen's termination almost seven weeks later. See Tr. at 65, 108, 555. Likewise, Red Label's contention that Andersen was terminated in order to prevent Jimmy Walker from physically attacking him is simply not credible, particularly in view of Jimmy Walker's failure to articulate or justify such extreme hostility when interviewed by Russell Hart in November of 1994. Moreover, it appears more likely than not that if Jimmy Walker did have some animosity toward Andersen, the animosity was the result of Andersen's protected activities. See Tr. at 534-36, 542, 558-59 (testimony by John Walker indicating that his son Jimmy had told him that Andersen had taken Truck 84 to be inspected on September 9 and had also encouraged Tom Jones to seek such an inspection). Hence, Andersen's protected activities would have at least been an indirect cause of the termination.

It is of course recognized that there is some evidence that in the past other Red Label drivers have requested vehicle inspections without being fired as a result. However, this evidence is very sketchy and by itself is not sufficient to outweigh the extensive volume of evidence which indicates that the reasons now being given for Andersen's termination are in fact a pretext.

Because Andersen was terminated from his employment in violation of the STAA, Andersen is entitled to reinstatement and back pay with interest. However, at the hearing Andersen rejected Red Label's offer of reinstatement. Therefore, the only matter in dispute is the extent of Andersen's entitlement to back pay. In this regard, the evidence indicates that although Andersen was able to earn approximately $1,800 as a self-employed logger after being fired by Red Label, he was not able to obtain any steady, full-time employment that paid as much as his job at Red Label until he began working at Sunshine Minting on January 30, 1995. Hence, I find that Andersen suffered an actual loss of income between September

[36] It is also noted that even if Andersen's conduct on July 21 could be fairly characterized as insubordinate, it occurred in the context of a clearly protected activity and was hardly so extreme as to be indefensible in its context. Hence, by itself such conduct would not provide a lawful basis for Andersen's termination. See Kenneway v. Matlack, 88-STA-20 (June 15, 1989).

9, 1994, and January 30, 1995, and that he is entitled to recover the difference between what he earned as a logger and what he would have earned by working for Red Label during that period.[37] Since Andersen would have earned an additional $4,750 if his employment by Red Label had continued until January 30, 1995, (i.e., 4.75 months times $1,000), his unlawful termination by Red Label caused him a net loss of $2,950 (i.e., $4,750 minus $1,800 earned logging). In addition, Andersen also lost approximately $140 in wages due to his attendance at the hearing. Thus, he is entitled to a total payment of $3,090, plus interest at the rates prescribed at 26 U.S.C. §6621. It is hereby officially noticed that during the relevant period the annual interest rate prescribed under 26 U.S.C. §6621 was 9 percent. Accordingly, the $3,090 liability for lost wages pay shall accrue interest at an annual rate of 9 percent until paid.

B. Mulanax's Termination

Red Label does not dispute the evidence indicating that Mulanax engaged in protected activities and that an adverse action was taken against him. However, Red Label does dispute the contention that John Walker knew of Mulanax's protected activities at the time he decided to fire him. As well, Red Label also disputes the contention that those activities were a likely cause for the termination.

1. Knowledge of Protected Activities. The evidence clearly shows that Mulanax engaged in two distinct protected activities on September 9: he arranged for the inspection of Truck 80 and later in the day refused to continue driving a van because of alleged problems with its brakes. There is no direct evidence indicating exactly when John Walker first learned of these actions, and Walker has testified that he decided to terminate Mulanax before learning of either of these protected activities, i.e., as soon as he overheard Mulanax use obscenities on the radio during the morning of September 9. Hence, if Walker's testimony were credible, it would be necessary to find that the Prosecuting Party has failed to establish one of the key elements of a prima facie case. However, I find that John Walker's testimony on this issue is not credible

[37] The Prosecuting Party contends that Andersen is also entitled to recover for an alleged difference between what Andersen earned at Sunshine Minting between January 30 and March 13, 1995, and what he would have earned if employed by Red Label during that period. However, the Prosecuting Party has failed to recognize that Andersen's earnings at Red Label were almost exactly the same on a weekly basis as his earnings at Sunshine Minting, i.e., that when Andersen's $1,000 monthly salary at Red Label is annualized over 52 weeks and then converted into a weekly salary, it is equivalent to $230 a week---the same amount that Andersen testified he was earning at Sunshine Minting.

and that he did not in fact decide to terminate Mulanax until after he had learned of Mulanax's protected activities. There are two primary reasons for this conclusion.

First, the implausibility of the story that Walker told Mulanax about being contacted by the FCC circumstantially indicates that Walker in fact knew of Mulanax's protected activities at the time he decided to fire Mulanax and was attempting to use the FCC story to deliberately conceal his actual motivation for that action. Indeed, the evidence that Walker fabricated the story about the call from the FCC is quite strong. For instance, it is clear from Jack Bazhaw's testimony that the FCC never contacted Walker about Mulanax's language. Moreover, a variety of other evidence shows that over time Walker has changed his account of the alleged call in several material respects. For example, although Walker initially told Mulanax that he had received the alleged call before noon on September 9, during the hearing Walker asserted that the call had not come until he was at his home on the evening of September 9. Tr. at 217, 529. Similarly, even though Walker indicated to Mulanax that the FCC had represented that it would reduce a putative monetary fine if Mulanax were fired, Walker now asserts that the alleged caller did not even identify himself as an FCC employee.[38] Id. Likewise, Walker wrote on the Daily Incident Log documenting Mulanax's termination that Mulanax had been fired on "9/9/94," but now contends that this entry was back dated and that the termination did not occur until September 12. RX 12, Tr. at 529.

Second, there is convincing circumstantial evidence that by the time Walker actually informed Mulanax that he was being fired, he knew of at least one and probably both of Mulanax's protected activities. For example, in view of the operational problems apparently caused by the sidelining of Trucks 80 and 84 on the morning of September 9, it is more likely than not that the dispatcher or some other employee of Red Label promptly informed Walker that these two trucks had been taken out of service as a

[38] It is recognized, of course, that Walker now denies having spoken at all to Mulanax on September 9. However, this denial is not credible in view of the fact that Walker's own handwritten notes indicate that he fired Mulanax on the ninth and the fact that other documentary evidence clearly indicates that on September 12 Mulanax reported to OSHA that he had been fired by Walker on September 9. See RX 12 (Daily Incident Log documenting Mulanax's termination), PX 7 (OSHA report of Mulanax's initial complaint). Indeed, it appears that Walker is now asserting that the termination did not occur until September 12 in order to explain away the fact that about two months after the termination he told an OSHA investigator that the alleged FCC call had not taken place until the evening of September 9. Tr. at 362.

result of the actions of Andersen and Mulanax. Indeed, it appears highly likely that if Walker did in fact overhear Mulanax's argument with Cheryl Eby on the morning of September 9, he also overheard enough of the conversation to determine that Mulanax had requested an inspection of Truck 80. Likewise, since Mulanax testified that he conveyed his refusal to continue driving the blue van directly to Jimmy Walker shortly before Jimmy Walker told him to go immediately to John Walker's office, it also seems likely that when Mulanax appeared in the office and was fired, John Walker also knew of Mulanax's refusal to drive the van. Tr. at 215-16. In addition, the fact that Red Label is a small, informally managed family enterprise may be sufficient evidence by itself to warrant a finding that Mulanax's protected activities were made known to John Walker before Mulanax's termination. See D & D Distribution Co. v. NLRB, 801 F.2d 636, 641 (discussing the "small shop doctrine"); Ertel v. Giroux Brothers Transportation, Inc., 88-STA-24 (Feb. 16, 1989).

2. Likely Cause for the Adverse Action. The Prosecuting Party contends that the close temporal relationship between Mulanax's protected activities and his termination is sufficient to warrant a finding that the protected activities were a likely reason for the termination. In an effort to refute this contention, Red Label again relies on the assertion that John Walker decided to fire Mulanax immediately after hearing him use profanity during the morning of September 9 and before he had any knowledge of Mulanax's protected activities. For the reasons previously explained, this assertion is not convincing. Accordingly, I find that since Mulanax's termination occurred almost immediately after he engaged in protected activities, there has been a sufficient showing that those activities were a likely reason for the termination. This conclusion is, of course, strengthened by the fact that John Walker's statements to Mulanax at the time of his termination have since been shown to be less than credible.

Since the evidence shows that all four prerequisites for a prima facie case have been met, Red Label has the burden of producing evidence to show that Mulanax's termination was in fact motivated by lawful considerations. Red Label has attempted to satisfy this burden by offering evidence that the actual reason for the termination was Mulanax's alleged use of profanity on the radio and his allegedly unauthorized taking of Truck 80 on the morning of September 9. Red Label has offered testimony from a variety of witnesses to substantiate both of these assertions, and such evidence is more than sufficient to meet an employer's burden of producing evidence of a lawful motive. See Burdine, supra. Accordingly, it is necessary to weigh all of the relevant evidence in order to determine whether Mulanax's termination did in fact violate the STAA.

Red Label's primary justification for terminating Mulanax is that he used terms such as "the fucking rain" and "the fucking

freight" when speaking on Red Label's private radio frequency. Although Mulanax has denied using such language, the preponderance of the evidence supports a conclusion that he did in fact utter such words. The use of such profanity on the radio is unprofessional, offensive, and could in theory jeopardize Red Label's license to use a private radio frequency. Hence, it is entirely conceivable that Mulanax's termination could have been motivated by bona fide dissatisfaction with his use of such profanity. However, there is other evidence which strongly militates against such a conclusion and clearly demonstrates that Mulanax's use of profanity was a mere pretext for the termination. First, as already explained, the evidence shows that rather than simply telling Mulanax that he was being fired for using profanity, John Walker fabricated a story about being called by the FCC. Second, Red Label's nearly simultaneous termination of Andersen for having Truck 84 inspected clearly supports an inference that the real reason for Mulanax's termination was his nearly identical act of having Truck 80 inspected. See 29 C.F.R. §18.404(b). Finally, there is evidence which indicates that the use of profanity on Red Label's radio frequency was not uncommon and not previously a cause for termination.[39]

Red Label's second alleged justification for terminating Mulanax is that he deliberately drove a truck that had been taken out of service. This justification is somewhat more credible than the first justification, but it is still not convincing. Although Ron Salisbury did testify that he had taken Truck 80 out of service on the evening of September 8, the credibility of this testimony is severely undermined by the fact that Red Label has given inconsistent accounts of how and when the truck was supposedly taken out of service. For example, although Salisbury now claims that the key to Truck 80 was given an "out-of-service" tag and

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[39] For example, Shane Steele testified that he heard swear words over the radio, including "shit," "damn" and "fuck," two to three times a month, and that usually the use of such language just resulted in a verbal reprimand over the radio. Tr. at 314-15. Likewise, Cheryl Eby testified that other drivers said "shit," "damn," and "hell" over the radio, and that as far as she knew, they were only reprimanded for saying these words. Tr. at 488. Eby also testified that September 9, 1994, was the only day she ever heard Mulanax swear over the radio. Tr. at 488-89. While Red Label has emphasizes Ron Salisbury's testimony that he was fired during the latter part of October of 1994 for saying "fuck" over the radio, such post hoc evidence is not particularly convincing. Indeed, it appears that if Salisbury had really believed that Mulanax was fired for using such language, he would not have subsequently used it himself. Finally, it is noted that although Red Label's post-hearing brief asserts that John Walker also fired his own son for using profanity on the radio, there is in fact no support for this assertion anywhere in the hearing transcript.

placed on a special pegboard, Red Label's interrogatory answers indicate that nothing more was done to remove the truck from service than "simply" removing the keys from the truck. Tr. at 406-09, 425, 567-68. Moreover, there is even a direct conflict among Red Label's own witnesses about whether the tagging and pegboard procedure described by Salisbury was even being used at the time that Mulanax was fired.[40] See Tr. at 514 (testimony of John Walker), Tr. at 477-79 (testimony of Cheryl Eby), Tr. at 493-94 (testimony of Debbie Salisbury). In addition, even though Salisbury asserts that he did not discover the mechanical problem that caused him to take Truck 80 out of service until September 8, the Daily Incident Log documenting Mulanax's termination states that parts for Truck 80 had been on order for two days. Tr. at 424, RX 12. If nothing else, such dramatic inconsistencies suggest that any inquiry by John Walker into Mulanax's use of Truck 80 was not thorough enough to be regarded as a good faith attempt to determine if Mulanax had actually done something improper. Moreover, when such evidence is considered along with John Walker's dubious statements concerning the alleged telephone call from the FCC, it is almost impossible to conclude that Mulanax's allegedly unauthorized use of Truck 80 was a bona fide reason for his termination. Accordingly, I find that both of the reasons given for Mulanax's termination are mere pretexts and that the termination violated the provisions of the STAA.[41]

Since the evidence indicates that Mulanax was terminated from his employment as a result of his protected activities, he is entitled to reinstatement and back pay with interest. However, as previously explained, Mulanax has apparently found another job and has, in any event, declined Red Label's offer of re-employment. Hence, the only dispute concerns the amount of back pay to be awarded. In this regard, Mulanax estimated that during the period

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[40] In contrast, Andersen, Mulanax and Shane Steele all testified that such a procedure was not being followed prior to September 9, 1994. Tr. at 109 (testimony of Andersen), Tr. at 200 (testimony of Mulanax), Tr. at 300-01 (testimony of Shane Steele).

[41] It is noted that there is some evidence in the record suggesting that Red Label was dissatisfied with Mulanax's attendance record. See, e.g., RX 12 (notations on Daily Incident Log indicating that on one or more occasions Mulanax had arrived late or not at all for work). However, it appears that Red Label is not now claiming that these attendance problems were the reason for Mulanax's termination. Moreover, the evidence indicates that the bulk of any such attendance problems occurred long before Mulanax's termination and, in fact, even preceded his promotion from terminal worker to driver. Tr. at 176-77, 229-32, 576. Accordingly, I find that Mulanax's attendance problems were not one of the true reasons for his termination. See Yellow Freight Systems v. Reich, 8 F.3d 980, 986 (4th Cir. 1993).

he was employed by Red Label, he was paid a total of $2,040. Tr. at 180. However, Red Label's payroll records indicate that between Mulanax's first day of work on July 14 and his last day of work on September 9, he worked only 283.25 hours--275.25 hours of straight time and 8.0 hours of overtime. See RX 8, RX 10, RX 11. Since the parties have stipulated that Mulanax's hourly wage rate was only $5.00, it appears that Mulanax's testimony is in error and that in fact his total earnings during his 58 days of employment by Red Label were no more than $1,436.25. See Tr. at 23 (stipulation that Mulanax earned $5.00 per hour during the period he was employed as a driver). Accordingly, I find that Mulanax's back pay award should be based on average weekly earnings of $173.46 (i.e., $1,436.25 divided by 8.28 weeks). A total of 24.5 weeks elapsed between Mulanax's termination on September 9, 1994, and Mulanax's receipt of Red Label's offer of reemployment on March 1, 1995.[42] Hence, Mulanax's total potential wage loss is $4,249.77. However, since there is evidence that Mulanax earned approximately $220 doing odd jobs prior to receiving Red Label's offer of re-employment, the actual total wage loss is only $4,029.77.

Red Label argues that if Mulanax has any entitlement to back pay, the amount of any award should be substantially reduced because he failed to make a determined effort to find alternative employment and because he could not have been legally employed as a commercial truck driver by Red Label or any other motor carrier until his twenty-first birthday on March 12, 1995. Neither argument is convincing.

The rules concerning an employer's liability for back pay in STAA cases are set forth in Hufstetler v. Roadway Express, Inc., 85-STA-8 (Aug. 21, 1986), overruled on other grounds, Roadway Express, Inc. v. Brock, 830 F.2d 179 (11th Cir. 1987). In that decision, the Secretary of Labor determined that in cases arising under the STAA, lost wages will be fully compensable unless the respondent bears the burden of showing that the complainant "intentionally and heedlessly" failed to mitigate his damages by

[42] In this regard, it is noted that the Prosecuting Party has cited a decision from the Second Circuit in support of its argument that Red Label's liability for back pay should not be terminated until the date that Mulanax expressly rejected Red Label's offer of reinstatement. See Clarke v. Frank, 960 F.2d 1146, 1151-52 (2nd Cir. 1992). However, that decision did not directly address remedies under the STAA. Moreover, the Secretary of Labor has indicated that in cases arising under the STAA an employer's liability for back pay continues only until a respondent reinstates a complainant to his former position "or makes him a bona fide offer of reinstatement." Polewsky v. B & L Lines, Inc., 90-STA-21 (May 29, 1991). Accordingly, I find that Red Label's liability for back pay ended on March 1, 1995, when Mulanax's received Red Label's written offer of reinstatement.

seeking alternative employment. See also Jackson v. Shell Oil Company, 702 F.2d 197, 201-02 (9th Cir. 1983) (holding that in comparable cases a defendant has the burden of showing failure to mitigate damages from loss of employment by establishing (1) that there were suitable alternative jobs available which the plaintiff could have discovered, and (2) that the plaintiff failed to use reasonable care and diligence in seeking them out). It is clear that Red Label has failed to satisfy the requirements set forth in Hufstetler. Although it appears that Mulanax could have made a somewhat more concerted effort to seek alternative employment, the evidence does not demonstrate that his attempts to find new employment were so deficient that they could be characterized as intentionally and heedlessly ineffective. Moreover, there is no evidence in the record which indicates that Mulanax would have found a suitable alternative job, even if he had made a greater effort. It is of course recognized that for about four and one-half months Mulanax was a student at a local police academy. However, the evidence shows that the police academy classes were held only on weekends and evenings so that students could be employed on a full-time basis. Hence, any argument that Mulanax's enrollment in the academy prevented him from working is unpersuasive.

During the hearing, Red Label also appeared to contend that any award of back pay must be reduced because prior to March 12, 1995, Mulanax was under the age of 21 and therefore barred from driving for any commercial motor carrier by the provisions of 49 C.F.R. §391.11(b). See Tr. at 21. Under the Supreme Court's recent decision in McKennon v. Nashville Banner Publishing Company, ____U.S.____, 115 S.Ct. 879 (1995), when evidence which would justify an employee's termination is not discovered until after an alleged act of illegal discrimination has already occurred, a defendant accused of unlawful discrimination may not use such evidence to totally escape liability for unlawful conduct, but may, in appropriate circumstances, rely on such "after-acquired evidence" to avoid reinstating the terminated employee or to reduce the amount of damages that would otherwise be owed. Thus, it could be argued that since Mulanax was completely barred by law from working as a commercial truck driver prior to his twenty-first birthday, he would have had to have been fired anyway and is therefore not entitled to any back pay award in this case. However, such a conclusion would be in error because Red Label has failed to make the kind of evidentiary showing that is necessary to terminate liability for back pay under the McKennon decision. In particular, even though the McKennon decision explicitly indicates that back pay must continue to be paid until such time as an employer first became aware of a lawful reason for terminating an unlawfully discharged employee, in this case Red Label has failed to offer into evidence any information indicating when it first

realized that its employment of Mulanax as a driver was unlawful.[43] Moreover, even if Red Label had shown when it first became aware of the regulation prohibiting the employment of such drivers, the equitable doctrine of unclean hands would still prevent Red Label from now relying on its own illegal conduct in hiring an underage driver as a justification for reducing damages that would otherwise be owed.[44]

ORDER

1. The Respondent shall pay Complainant Andersen back pay in the amount of $3,090.00 plus interest at an annual rate of 9.0 percent until paid.

2. The Respondent shall pay Complainant Mulanax back pay in the amount of $4,029.77 plus interest at an annual rate of 9.0 percent until paid.

3. The Respondent shall expunge from its files all adverse references to the protected activities of Complainants Andersen and Mulanax and shall refrain from providing adverse information to any third party about the job performance of either Complainant.

[43] In this regard, it is noted that Red Label did produce a February 22, 1995 safety report by the Federal Highway Administration which indicates that Mulanax's employment as a driver prior to his twenty-first birthday was in violation of the provisions of 49 C.F.R. §391.11(b). However, although this report was marked as Respondent's Exhibit 41, it was not offered into evidence, and no testimony was provided to indicate when this report was either received or read by Red Label's management.

[44] Indeed, the Supreme Court's decision in McKennon specially noted that equitable considerations should be taken into account when determining the appropriate relief in cases involving unlawful discrimination. ___ U.S. at ___, 115 S.Ct. at 886. In this regard, it is also noted that there are no grounds for concluding that Mulanax in any way misled Red Label concerning his true age. In fact, the evidence indicates that Red Label was at all times aware of Mulanax's actual age, and that he was hired as a driver only because Red Label did not know of the regulation prohibiting the employment of drivers under age 21 or did not care to obey it. See Tr. at 177-78 (testimony by Mulanax that he disclosed his true age to Red Label at the time of his employment).

Paul A. Mapes
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the related administrative file is herewith being forwarded to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. The Office of Administrative Appeals has responsibility for advising and assisting the Secretary of Labor in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations set forth at 29 C.F.R. Parts 24 and 1978.